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MOTION, NOTICE, PETITION AND BRIEF

Supreme Court of the United States

OCTOBER TERM, 1920.

No._____

THE FIRST NATIONAL BANK,
Petitioner,

vs.

THE J. L. MOTT IRON WORKS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Wm. S. NELSON,
JOHN F. WILLIAMS,
Counsel for Petitioner.

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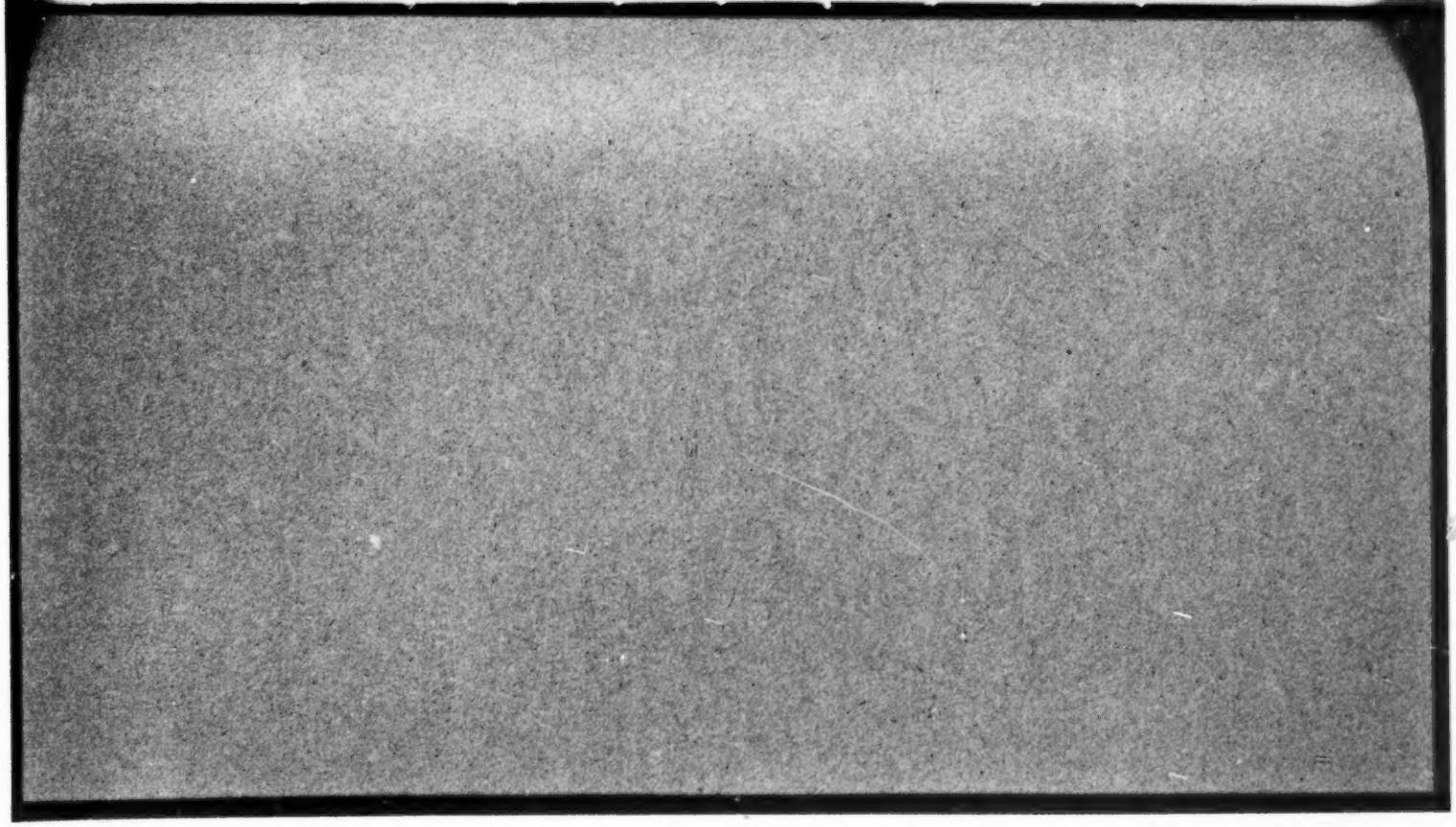

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No. .....

THE FIRST NATIONAL BANK,
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MOTION.

Now comes the Petition above named, the First National Bank of Aiken, by its counsel, W. S. Nelson, appearing in its behalf, and moves the Court to grant the writ of certiorari, as prayed for in the petition heretofore filed.

Wm. S. NELSON,
Attorney for Petitioner.

NOTICE.

P. F. Henderson, Esq., Attorney for Respondent:

You will please take notice that on Monday, November 15th, 1920, at the opening of the Court, or as soon thereafter as counsel can be heard, the above motion will be submitted to the Supreme Court of the United States.

You will please find attached hereto a copy of the Petition, of Brief in support of same, and also a copy of the Tran-

script of Record as printed in the Appellate Court of South Carolina, to be used on this motion.

Wm. S. NELSON,
Attorney for Petitioner.

The foregoing notice is hereby accepted, and delivery of a copy thereof, together with the above mentioned Petition, Brief and Transcript of Record, are hereby acknowledged this 21st day of October, 1920.

HENDERSONS, by
P. F. HENDERSON,
Attorney for Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. .....

THE FIRST NATIONAL BANK,
Petitioner,

vs.

THE J. L. MOTT IRON WORKS,
Respondent.

To the Supreme Court of the United States of America:

The Petition of The First National Bank of Aiken for a Writ of Certiorari directed to the Supreme Court of South Carolina, to bring before the Supreme Court the case of The J. L. Mott Iron Works, Respondent, against The First National Bank of Aiken, Appellant.

The said petitioner would respectfully show to this Court as follows:

1. This suit originated in the Court of Common Pleas for Aiken County, South Carolina, where judgment was rendered in favor of the plaintiff, The J. L. Mott Iron Works, and against the defendant, The First National Bank of Aiken. This judgment was affirmed on appeal to the Supreme Court of South Carolina, by its judgment filed and entered on July 25th, 1920, and the record is now in said Court.

2. The plaintiff alleged in its complaint (pg. 2, F. 7): "The defendant, The First National Bank, in writing guaranteed and agreed legally, and with due authority, to become responsible for and pay in consideration of the sale and delivery of the said merchandise, fixtures and goods to Kaiser Company, the whole amount of said bill," the bill being two thousand, three hundred, sixty-five dollars and fifty cents, for merchandise consisting of fixtures for a hospital building at Aiken, to be delivered to a plumbing company, known as the Kaiser Company. The defendant, The First National Bank of Aiken, answering the complaint, said (pg. 14, F. 55-56): "This defendant further alleges that the foregoing paragraph of this defense sets out the facts under which plaintiff claims this defendant to be liable, and it denies that it has ever been liable to plaintiff, under the laws applicable to said transaction, and under the laws of the United States; for the indebtedness of its co-defendant, and denies that it can be held so liable, or that plaintiff has any authority for claim of liability on the part of this defendant, on account of such alleged guaranty." It will be seen from the pleadings that the petitioner is a National Bank, created under the National Banking Laws of the United States.

3. There was considerable testimony introduced on the part of both parties, and the testimony developed, as will be seen by referring to the record used for appeal in the Supreme Court of South Carolina, that the respondent manufactured plumbing fixtures, and that the Kaiser Company

is a plumbing concern, who had a contract to install the plumbing in the Aiken Hospital, and that the Cashier of the appellant bank undertook to guarantee the bill of merchandise to be used by the plumbing concern, and the action was brought against the petitioner on the written guaranty, as will be seen by reference to the decision of the Supreme Court of South Carolina, the finding being, to use the Supreme Court's own language: "The cause of action * * * * against Kaiser is upon an account for goods sold; and against the bank upon a paper writing made to guarantee payment of that account, and of the following purport, etc."

4. The answer of The First National Bank of Aiken, besides pleading a denial of any liability on account of such alleged guaranty, specifically refers to the National Banking Laws, and denied liability there under, on account of the alleged guaranty, on which the respondent brought an action; and while the petitioner and the Kaiser Company were sued jointly in the State Court, the Kaiser Company's attorneys conceded that the question now to be presented to this Court does not concern or affect the Kaiser Company, and they, for that reason, waive being made a party to this proceeding; the respondent, however, has entered its judgment against the petitioner, and is endeavoring to compel petitioner to pay said judgment, interest and costs.

5. That when all the testimony was in (F. 211, pg. 53), this petitioner made its motion to direct a verdict as to the bank, on the ground that a national bank could not guarantee payment of mercantile bills, such as the one in question, and that the Cashier had no authority to bind it for such a bill as guarantor; and a similar motion was made at the conclusion of the plaintiff's testimony in the trial Court (F. 109-110, pg. 28), said motion being for a non-suit as to the bank, upon the ground that it was a national bank, and the action on the guaranty could not be maintained for the reason that the bank could not become guarantor of bills of merchandise, being unauthorized by the United States Statute, and that it could refuse to perform at any time it saw fit, and that any one who takes a guaranty from a

national bank cashier, who cannot in such case bind the bank, takes it with that notice under the law." The Court overruled the motion, saying: "It is for the jury to say what benefit the bank got out of the transaction."

6. The Judge charged the jury at the trial: "But where the bank is benefited, indirectly or directly, and does it (meaning guarantees the bill), then it is estopped from saying it cannot. It is not only the law, but it is good morals, and that is what I take those decisions to mean which you have heard read here." (pg. 85, F. 337). By reference to page 87, folio 347, the Court will see that the trial Judge used this language in his charge: "Even though the Board of Directors of The First National Bank did not pass on the guaranty offered in evidence, if the bank received the benefit of the transaction as an incident to the transaction of its business, then the bank is estopped from raising any defense that the cashier had no authority to make a guaranty, and to the contrary, the bank would be bound thereby."

The Supreme Court of South Carolina, which is the highest Court in the State that could pass on the question, said (Sub. Div., 10 of the Opinion): "We revert to the major issue, first circumstantially set out. The bank is clearly liable on the guaranty. It is true that generally a cashier, or for that matter, any other agency of a banking corporation, has not the power to guarantee contracts of the instant character, which third persons have entered into, but circumstances alter cases, and the circumstances which we before recited made a case where the bank, in law, and in good conscience, ought to respond. It is plain that upon occasion it may be to the monetary interest of a bank to guarantee the performance of a contract of others, the bank may be in danger of serious loss, and the way to save itself may be to come to the rescue of those who have gotten into its doors. Such a guaranty is denominated a transaction incident to the performance of its business of banking; it falls into the way of the bank; the bank does not go out of the way after it. That rule—applied to the circumstances

of this case, vindicates the instant guaranty."

7. This opinin was delivered on June 28th, 1920, but the remittitur was stayed until the 27th of July, 1920, when the remittitur was revoked, and the final judgment entered by the Supreme Court of South Carolina.

8. The exception that was made to the Supreme Court of South Carolina, and is made again, and now presented for the review of the judgment of the Court by the Supreme Court of the United States, is as follows, to-wit: (a) That the Judge erred in charging the jury that where the bank endorsed, and was benefited, indirectly or directly, then it is estopped from saying that it cannot endorse, and that it is not only the law, but good morals; whereas, he should have held that a national bank is not estopped, from pleading the invalidity of such a contract of guaranty in an action brought on the contract of guaranty. (b) That the trial Judge erred in his charge to the jury that the bank is estopped from raising the defense that the cashier had no authority to bind the bank with a guaranty, even though the directors did not pass on the same, the error being that this was an action on the contract of guaranty, and the doctrine of estopple in such a case is inapplicable to a national bank. (c) The trial Judge erred in refusing a motion for non-suit and to direct a verdict on the ground that the bank, being a national bank, could not be held on a contract of guaranty in an action upon the contract. (d) The Supreme Court of South Carolina erred in holding, after finding that the action was brought on the contract of guaranty, that the bank, "in law, and in good conscience, ought to respond," and that where a bank guarantees payment of a bill of merchandise for a customer, who has gotten into its doors, even though such a contract of guaranty be not in the negotiation of such papers as it is authorized to handle, such a guaranty is denominated a transaction incident to the performance of its business, the error being that the doctrine of estopple as applied by the Supreme Court of South Carolina does not apply to an ultra-vires act of guaranty in an action on the contract, and the guaranty

of a bill of merchandise for a patron of the bank who is indebted to the bank is not a transaction incidental to the business of a national bank.

9. Therefore, the practical question which is presented to the Supreme Court, and which raises the point to be considered is, where a national bank guarantees the payment of a bill of merchandise for its customer, and an action is brought on the contract of guaranty by the seller of the merchandise, can the bank plead the ultra-vires of the act of guaranty without being estopped by reason of *any* benefit, direct or indirect, received by the bank, even though such benefit be less than the amount guaranteed; and is such a guaranty incidental to the business of a national bank?

10. It is respectfully submitted that the present case is one in which it is proper for this Court to issue a Writ of Certiorari for the following reasons:

(1) Because your petitioner has been denied a title, right, privilege and immunity specially set up and claimed under a Statute of the United States, to-wit: The National Bank Law, within the meaning of the Act approved September, 6th, 1916, amending Section 237 of the Federal Judicial Code.

(2) Because the questions of law involved herein have been practically decided in petitioner's favor by former decisions of this Court, and there is a conflict between the decisions of the Supreme Court of South Carolina and the rule announced by this Court on such Federal questions.

(3) Because there is a denial to the stockholders and depositors of your petitioner, which is a national bank, of a title, right, privilege and immunity given to them under the National Banking Law, and it is a question of such great importance on account of the increasing number of national banks throughout the country that this Court ought to settle definitly the question of to what extent a national bank must respond in an action on a contract of guaranty for a bill of merchandise; and also the question of whether or not such a transaction, where the person whose bill of merchandise is guaranteed, is indebted to the bank, is for

that reason, a transaction incidental to the banking business of a national bank.

WHEREFORE, your petitioner prays that this Honorable Court will be pleased to grant a Writ of Certiorari in this case to the Supreme Court of South Carolina, to bring up this case to this Honorable Court for such proceeding therein as to this Court may seem just.

THE FIRST NATIONAL BANK,
By Wm. S. NELSON,
Attorney for Petitioner.

October 21, 1920.

I hereby certify that I have prepared the foregoing petition, and that the same contains correct statements founded on the record in this case, and that the petition is well founded, and the case is one in which the prayer of the petition should be granted by the Court.

Wm. S. NELSON,
Counsel for Petitioner.

I, John F. Williams, an attorney at law of the State of South Carolina, do hereby consent for this case to proceed to the United States Supreme Court between the petitioner and respondent, with the Kaiser Company withdrawn therefrom, and the Kaiser Company does hereby waive all requirements of a party to said proceeding.

JOHN F. WILLIAMS,
Attorney for Kaiser Company.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. .....

THE FIRST NATIONAL BANK,
Petitioner,

vs.

THE J. L. MOTT IRON WORKS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF IN SUPPORT OF PETITION.

Wm. S. NELSON, Attorney for Petitioner.

STATEMENT.

This is an action brought by the respondent against petitioner on a contract of guaranty made by petitioner's cashier, guaranteeing the payment to respondent of a bill of merchandise, said contract being a telegram, dated December 2nd, 1916, set out in the opinion of the State Supreme Court. The petitioner (being defendant below), pleaded the ultra-vires of the guaranty under the National Bank statute, said guaranty being for a bill of merchandise, and not authorized by the Board of Directors (pg. 14, FF. 55-56), and the question was raised at every stage of the trial; but judgment went against the petitioner, and on appeal the Supreme Court affirmed it.

POINTS AND AUTHORITIES.

POINT I. Where a national bank guarantees payment of a bill of merchandise for its customer, and an action is brought on the contract of guaranty, can the bank plead the ultra-vires of the act of guaranty, without being estopped by reason of a benefit, direct or indirect, received by the bank, even though the benefit be not money or less than the amount guaranteed?

POINT II. Is such a guaranty, when the customer owes the bank, and the bank is therefore in danger of loss, an incident to the business of a national bank?

AUTHORITIES.

Godfrey vs. Lumber Company, 88 S. C., 142.

Code, 1912 (S. C.), Vol. 2, Sec. 194, 197, 199.

Farmers' & Merchants National Bank vs. Smith, 77 Fed. 134.

Bowen vs. Needles National Bank, 87 Fed., 430.

First National Bank vs. Monroe, 32 L. R. A. (N. S.), 553.

Appleton vs. Citizens Central National Bank, 32 L. R. A. (N. S.) 549, and 54 L. Ed., 443 (Note L. R. A. (N. S.), 546.

De la Vergne Company vs. German Savings Institution, 175 U. S., 40, 58, 44 L. Ed., 65, 71, 20 Sup. Ct. Rep. 20, 25.

ARGUMENT.

Although the Code practice prevails in South Carolina, still the modes of trial are preserved. In *Godfrey vs. Lumber Company*, 88 S. C., page 142, the Supreme Court of South Carolina said: "It was held that he had elected to enforce the contract, and that he was bound by his election, and the Circuit Decree rescinding it was set aside. So, in this case, while two remedial rights arose out of the same cause of action, plaintiffs certainly would not be allowed both remedies—damages for misrepresentation and also

rescission of the contract and restoration of the *status quo*. They are inconsistent. One is allowed on the ground that the contract has been affirmed, the other on the ground that it has been repudiated. Therefore, if plaintiff had alleged the facts and prayed for both forms of relief, or for the alternative relief of damages or rescission, they would have been required to elect which remedy they would pursue. And while, under the present system of procedure, both forms of relief are administered in the same forum, yet they require different modes of trial; for nothing is better settled by the decisions of this Court than that the adoption of the reformed procedure made no change in the inherent distinctions previously existing between actions at law and suits in equity, or in the modes of trial thereof."

The complaint that the action was on the contract of guaranty, committed plaintiff to that forum (law). The only pleading on the part of the defendant (petitioner here) could be a demurrer, when the failure to state a cause appeared on the face of the complaint (Code S. C., 1912, Vol. 2, Sec. 194); or answer where lack of cause does not appear on face of complaint. (Sec. 199, Code S. C., 1912, Vol. 22). Section 194 says: "Defendant may demur to the complaint, when it shall appear upon the face thereof" * * * * "That the complaint does not state facts sufficient to constitute a cause of action."

Section 199 says: "The answer of the defendant must contain a statement of any new matter constituting a defence." * * * *

Section 197, Code, 1912, Vol. 2, says: "When any of the matters enumerated in 194 do not appear upon the face of the complaint, the objection may be taken by answer."

Hence, when the complaint alleged that the defendant legally became bound to pay the bill, answer was the proper pleading, setting up the banking law of the United States. Therefore, the contract of guaranty was the basis of the action.

BRIEF.

As was said in the case of *Farmers' & Merchants National Bank vs. Smith*, 77 Fed., Rep. 134, "It may well be concluded that the pleader intended to rely upon a single ground of recovery, and in such case, he should be confined to the cause of action, which, upon a fair construction of the complaint, he appears to have selected." And the Court further says: "We have no doubt that it was framed solely with the view of recovery upon the guaranty, and we think it should be so construed." The Court, in this case, further says, in speaking of persons who deal with corporations of this character, "He is advised by the very nature of the action that all acts done and confirmed in relation thereto, are beyond the power of the corporation, and if he expects to hold the corporation liable for any contract or obligation entered into by the cashier, or other officer in the course of that transaction, he should at least see to it that such contract or obligation is approved by the Board of Directors or other governing body.

Bank vs. Graham, 79 Pa. St., 106.
Moore vs. Bank, 111 U. S., 156.
4 Sup. Ct., 345.
Thomp. Corp. Pa., 4754-4755."

In *Bowen vs. Needles National Bank*, 87 Fed., Rep., page 430, the Court (page 438), says; quoting from *Bank vs. Pirie*, 82 Fed., Rep., 799: "The Act of Congress under which the bank was organized confers no authority upon national banks to guarantee payment of debts contracted by third parties, and actions of that nature, whether performed by the cashier of his own motion, or by direction of the Board of Directors, are necessarily ultra-vires. A national bank may endorse or guarantee payment of commercial papers which it holds when it rediscounts or disposes of the same, in the ordinary course of business. Such power, it seems, a national bank may exercise as incidental to the express authority conferred on such bank by the National Banking Act to discount and negotiate promissory notes, drafts, bills

of exchange and other evidences of debt; but it has never been supposed that the Board of Directors of a national bank can bind it by contracts of suretyship or guaranty, which are made for the sole benefit and advantage of others. The National Banking Act confers no such authority, in express terms, or by fair implication, and the exercise of such powers by such corporation would be deterimental to the interest of depositors, stockholders, and to the public generally. (Cites cases). In contemplation of law, therefore, the venders knew, when they sold the goods in controversy, that the guaranty in question was of no avail as security, even though they supposed that it had been executed with the sanction of the Board of Directors."

In the *First National Bank vs. Monroe*, 32 L. R. A. (N. S.), 553, the Georgia Supreme Court says: "But an ultra-vires act of a corporation is not binding upon it, and it cannot ratify such an act, or be estopped from pleading it to be void under the decisions of the Supreme Court of the United States."

In the *First National Bank vs. American National Bank*, 173 Mo., 153, 158, 72 S. W., 1059, 1069, it was said: "The powers of a national bank, under the National Banking Act, are essentially matters for Federal construction and interpretation, and whatever rules may obtain in the several States as to the powers of corporations under State Statutes, all State Courts must yield to the decision of the Supreme Court of the United States, construing the powers of national banks, under the National Banking Act."

The Court then proceeds to show that the Supreme Court of the United States has decided that a national bank has no power to bind itself that a draft drawn on its customer will be paid, and when sued on such a contract, it may plead ultra-vires, and the fact that the other party to the contract has performed his part of it does not estop the bank from so pleading. The Court concludes its opinion with these words: "It will be of no profit, in this case, to consider the rule of law adopted by the several States bearing upon the power of banks, organized by authority other than the Fed-

eral Government to enter into such contracts, or to interpose the defense of ultra-vires after the other party to the contract has fully performed it, for the decisions of the Federal Courts treat all such contracts as void and unenforceable as to national banks, and this Court is in duty bound to defer to those Federal decisions." Continuing, the Georgia Supreme Court says in this case: "In *California National Bank vs. Kennedy*, 167 U. S., 362, 268, 42 L. Ed., L., 198, 200, 17 Sup. Ct. Rep., 831, 833, the Court quotes approvingly from a previous decision of that Court, the following language: "The doctrine of ultra-vires by which a contract made by a corporation beyond the scope of its corporate powers, is unlawful and void, and will not support an action, rests, as this Court has often recognized and affirmed upon three distinct grounds: The obligation of any one contracting with a corporation to take notice of the legal limits of its powers, the interest of its stockholders not to be subjected to risks which they have never undertaken, and above all, the interest of the public that the corporation shall not transcend the powers conferred upon it."

In *De la Vergne Company vs. German Savings Institution*, 175 U. S., 40, 58, 55, L. Ed., 65, 71, 20, Sup. Ct. Rep., 20, 25, the Court says: "Whatever doubts might have been once entertained as to the power of corporations to set up the defense of ultra-vires to defeat a recovery upon an executed contract, the rule is now well settled, at least in this Court, that, where the action is brought upon the illegal contract, it is a good defense that the corporation was prohibited by statute from entering into such contract, although in an action upon a *quantum meruit*, it may be compelled to respond for the benefit actually received."

In *Appleton vs. Citizens Central National Bank*, 32 L. R. A. (N. S.), 545, (54 L. Ed., 443), the Appellate Court of New York held, to quote from syllabus, "Although a guaranty by a national bank of repayment of a loan made by a stranger to its debtor, which is larger in amount than he owes it, but out of the proceeds of which it is to receive its claim, is ultra-vires, it is liable to the lender for the sum

which it receives by reason of such guaranty." In the opinion of the Court, on page 549, the New York Appellate Court says: "A contrary rule obtains in the Supreme Court of the United States; there it is held that the execution of an ultra-vires contract by one party cannot confer upon its validity, or authorize the other party to sue on its obligation." And then the Court proceeds to show that at the same time it is held that the party cannot retain the money or property received by it under the contract, and also refuse to perform.

The case of the *Citizens Central National Bank vs. Appleton* went to the Supreme Court of the United States, and is reported in 54 Law Ed., 443, and that Court said, quoting from another decision referred to therein, "A contract ultra-vires being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the Courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law by permitting property or money, parted with on the faith of the unlawful contract to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms, but on an implied contract of the defendant to return, or failing to do that, to make compensation for, property or money, which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm the unlawful contract."

In the note to the case of *Appleton vs. Citizens Central National Bank*, 32 L. R. A. (N. S.), on page 546, it is said: "Granting that a national bank is without power to guarantee the debts of another, either in terms or in effect, the question arises, where it has received benefits as a result of the guaranty, whether it may be held responsible for the amount of benefit so received. The two cases published in connection with this point declare what seems to be two correct principles of law (referring to the Monroe and Apple-

ton cases above), where the action against the bank is solely upon the guaranty; the bank is not estopped from setting up the plea of ultra-vires; and such plea is a complete defense to the action, irrespective of whether the bank has reaped any benefit from the transaction. This is the rule of *The First National Bank vs. Monroe*, Post 550. On the other hand, where the bank has reaped advantages as a result of making the guaranty, it cannot avail itself of the plea of ultra-vires to defeat its liability, at least to the extent of the benefit which it has received, where the alleged right of recovery is not based upon the guaranty, but is, for instance, grounded upon implied contract. This is the doctrine of *Appleton vs. Citizens Central National Bank*, which it will be observed, was affirmed by the United States Supreme Court, in 216 U. S. 196, 54 L. Ed., 443, 30 Sup. Ct. Rep., 364, both Courts taking care to point out that the action need not be regarded as grounded on the written contract of guaranty, but as based on an implied contract."

The second point in this case as to what is incidental to the business of a national bank in the handling of the obligations of the bank's customer, it is respectfully submitted, is determined by the National Bank Act itself, which we understand, defines the particular class of business that a national bank may do; and we submit that only such endorsements and guarantees as may incidentally follow the handling of those particular classes of paper would be denominated. Business incident to the transaction of the business; and nowhere does the Act authorize the guaranty of a bill of merchandise, either expressly or impliedly, where the customer who seeks the credit has gotten into the doors of the bank by reason of his indebtedness to the bank. This matter is discussed in the case of *Bowen vs. Needles National Bank*, 87 Fed., 430, quoted from hereinabove.

Wm. S. NELSON,
Petitioner's Attorney.

October 21, 1920.